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NO._____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

LEONARD G. LEVERSON,

Appellant,

v.

WILLIAM H. CONWAY, COMMISSIONER, VERMONT DEPARTMENT OF MOTOR VEHICLES,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF VERMONT

JURISDICTIONAL STATEMENT

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10 pp

QUESTIONS PRESENTED

1. Does the Commerce Clause prohibit a state from imposing a compensating use tax on property brought from another state without credit for sales tax paid the state of origin?

2. Is it a violation of the Equal Protection Clause, Article IV's Privileges and Immunities Clause, or the right to travel for Vermont to levy a use tax on property new residents bring with them without allowing a credit for sales tax paid other states when Vermont grants such a credit to its residents of longstanding?

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LEONARD G. LEVERSON,

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v.

WILLIAM H. CONWAY, COMMISSIONER, VERMONT DEPARTMENT OF MOTOR VEHICLES,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF VERMONT

JURISDICTIONAL STATEMENT

Leonard G. Leverson appeals from the final judgment of the Supreme Court of Vermont, dated June 15, 1984, holding that the Vermont Motor Vehicle Purchase

and Use Tax, Vt. Stat. Ann. tit. 32, §§ 8901-8911, is not unconstitutional as a violation of the Commerce Clause, art. I, § 8, cl. 3, of the United States Constitution; as a violation of his right to travel; as a violation of the Equal Protection Clause of the Fourteenth Amendment, am. XIV, § 1, cl. 4, to the United States Constitution; or as a violation of the Privileges and Immunities Clause, Art. IV, § 2, cl. 1, of the United States Constitution.

OPINIONS BELOW

The opinion of the Supreme Court of Vermont, not yet reported, appears as Appendix A hereto at p. 1a, infra.

The unreported opinion of the trial court, the District Court of Vermont, Unit No. 1, Rutland Circuit, appears as Appendix B hereto at p. 31a, infra.

JURISDICTION

The Supreme Court of Vermont entered a final judgment affirming the trial court on June 15, 1984. See p. 54a, infra. Appellant filed a notice of appeal with the Supreme Court of Vermont on June 25, 1984. See p. 56a, infra. Appellant is docketing his appeal in this Court within 90 days from the entry of the judgment of the Supreme Court of Vermont. This Court has jurisdiction under 28 U.S.C. § 1257(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, § 8, cl. 3, United States Constitution:

> The Congress shall have Power . . . To regulate Commerce . . . among the several States . . . .

Article IV, § 2, cl. 1, United States Constitution:

The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

Amendment XIV, § 1, cl. 4, United States Constitution:

No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

Vt. Stat. Ann. tit. 32, §§ 8901, 8902(2), 8903, 8905(b), 8907, 8909, 8911:

[The text of these statutes may be found at pages 136 through 146 of the unnumbered volume of Vt. Stat. Ann. containing tit. 32, §§ 6501 to end, and tit. 33, and at pages 3-4 of the 1983 supplement thereto, and is reprinted as Appendix E hereto at pages 58a-67a, infra.]

STATEMENT OF THE CASE

On May 29, 1982, while a resident of Wisconsin, appellant bought a 1979 Subaru station wagon in Wisconsin for $4,325. He paid a five percent sales tax of $216.25 to Wisconsin. In July, 1982, appellant moved to Vermont. Upon registering the car in Vermont in August of 1982, appellant paid, under protest, a $112 use tax required as a condition of registration. The tax was assessed at four percent of the car's "low book value" of $2,800. Had appellant been a resident of Vermont at the time he purchased his car, he would have received credit for the sales tax paid Wisconsin. Vt. Stat. Ann. tit. 32, § 8911(9); Wis. Stat. § 77.53(16).

After the Vermont Commissioner of Motor Vehicles refused to refund the

tax, on August 18, 1982, appellant filed suit for a refund in the small claims division of the Vermont District Court. Defendant appeared through counsel. The parties stipulated to the facts of the case, and submitted the case upon legal memoranda.

Appellant's memoranda challenged the constitutionality of the Vermont Motor Vehicle Purchase and Use Tax, Vt. Stat. Ann. tit. 32, §§ 8901 et seq., on the grounds of its repugnancy to the Commerce Clause of the United States Constitution, Art. I, § 8, cl. 3; the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution; the Proportional Contribution Clause of the Vermont Constitution, Vt. Const. ch. I, art. 9;

and the Privileges and Immunities Clause, Article IV, § 2, cl. 1, of the United States Constitution. The defendant's submissions defended the constitutionality of the tax against these challenges. The small claims court granted the defendant judgment and issued a written opinion. See infra, pp. 31e-53a.

Appellant appealed to the Supreme Court of Vermont, asserting the same four grounds for the tax's unconstitutionality. The questions appellant presented are printed as Appendix F hereto at pp. 68a-69a.[1] After

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[1]The questions the Vermont Supreme Court states in its opinion, infra, pp. 2a-3a, are the appellee's formulations of the issues.

briefing and argument, the Supreme Court of Vermont rejected each of the four constitutional arguments advanced and affirmed the trial court.

THE QUESTIONS ARE SUBSTANTIAL.

This case raises important questions regarding the duty of a compensating use tax state to give credit for sales tax paid another state. First, the case raises the question, as yet undecided by this Court, whether the dormant Commerce Clause requires a state that would impose a use tax on goods brought from another state to grant a credit for sales tax paid the state of origin. Secondly, this case raises the question whether, if a state chooses to grant such a credit for purchases made

out of state by its residents, it may constitutionally deny that credit to new residents who bring with them property purchased in their prior states of residence.

I. THE FIRST QUESTION IS SUBSTANTIAL.

A. This Court Has Expressly Reserved the Commerce Clause Issue Twice, Individual Justices Have Expressed Opposing Views, the Lower Courts Are Split, and Commentators Disagree.

As the trial court noted, infra, pp. 39a-40a, this Court has never decided whether the Commerce Clause requires a state to credit against its use tax a sales tax paid another state. The Court has, in fact, reserved decision on that point twice. Southern Pacific Co. v. Gallagher, 306 U.S. 167, 172 (1939);

Henneford v. Silas Mason Co., 300 U.S. 577, 587 (1937). At least one distinguished commentator and one legal reference work have noted this lacuna in the Court's jurisprudence. L. Tribe, American Constitutional Law (1978) § 6-16, at 359 n.24; 68 Am. Jur.2d Sales and Use Taxes § 191, at 257.

Individual Justices have expressed contradictory views. Justice Brennan suggested a view consonant with that of the court below in his concurring opinion in Halliburton Oil Well Co. v. Reilly, 373 U.S. 64, 76-77 (1963). In International Harvestor Co. v. Department of Treasury, 322 U.S. 340, 349-62 (1944) (Rutledge, J., concurring and dissenting in McLeod v. J. E. Dilworth

Co., 322 U.S. 327 (1944)), Justice Rutledge, although reserving decision on the instant point, 322 U.S. at 362, expressed the view that cumulative taxation of an interstate sale by the state of origin and the state of use would be an unconstitutional burden on interstate commerce. 322 U.S. at 359-60.

Lower courts are split. Compare Montgomery Ward & Co. v. State Board of Equalization, 272 Cal. App.2d 728, 78 Cal. Rptr. 373, 394 (1969) (invalidating provision of California use tax that failed to extend credit for sales tax paid other states), cert. denied, 396 U.S. 1040 (1970), with J. C. Penney & Co., Inc. v. Hardesty, 264 S.E.2d 604 (W.Va. 1980) (holding that consumers

lack standing to invoke the Commerce Clause to challenge use tax that failed to extend credit for sales tax paid other states).

Commentators likewise disagree. Most have adopted views inconsistent with that of the court below. See Comment, Compensating Use Taxes, 18 Ark. L. Rev. 321, 338-39 (1964-65) (suggesting that an offsetting credit is a "proper mechanism to keep interstate trade unfettered by provincialisms manifested in taxing statutes," id. at 339); Note, Economic Neutrality and the Compensatory Use Tax, 16 Stan. L. Rev. 1016, 1028 (1964) ("a credit provision in some form is more consistent with the desire of the drafters of the commerce

clause to destroy state economic boundaries than is the suggestion in Henneford that each state be viewed as a self-contained unit") (footnote omitted); Note, Developments in the Law--Federal Limitations on State Taxation of Interstate Business, 75 Harv. L. Rev. 953, 999 (1962) (use tax appears invalid on the ground of double taxation where the buyer takes delivery in a sales tax state other than the one in which the goods will be used); M. Cruz, The Use Tax: Its History, Administration, and Economic Effects 48 (1941) (same); but cf. T. Powell, New Light on Gross Receipts Taxes, 53 Harv. L. Rev. 909, 930-31 (1940).

B. The Decision of the Court Below Conflicts with Boston Stock Exchange v. State Tax Commission, 429 U.S. 318 (1977).

The court below reasoned that because appellant and his car were no longer "in transit" but "had come to rest," infra, p. 29a, commerce was at an end and the use tax imposed on appellant's car was not unconstitutional. Begging the question whether a use tax that fails to extend credit for sales tax paid another state discriminates against interstate commerce, the court announced its conclusion by stating that property at rest is "clearly an appropriate subject to the imposition of a non-discriminatory use tax." Infra, p. 30a.

That property is "at rest," rather than "in transit," certainly subjects it

to a state's power to levy a nondiscriminatory tax. Michelin Tire Corp. v. Wages, 423 U.S. 276, 290 & n.11 (1976). But so labelling the property that is the object of a tax does not tell whether the tax discriminates. In Boston Stock Exchange v. State Tax Commission, 429 U.S. 318, 332 n.12 (1977), this Court rejected the notion that a tax should be sustained "because it is imposed on a local event at the end of interstate commerce." The question, the Court held, is not whether commerce is at an end, but whether the tax discriminates "on the basis of some interstate element." Id. See generally Dayton Power & Light Co. v. Lindley, 58 Ohio St.2d 465, 475, 391 N.E.2d 716, 721-22 (1979).

This Court has made it abundantly clear that the test of the validity of a state tax under the Commerce Clause is whether in its practical effect the tax works a discrimination against interstate commerce. Maryland v. Louisiana, 451 U.S. 725, 756 (1981). Moreover, only three days before the court below issued its decision,[2] this Court held that, in evaluating the effect on

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[2]While it is likely that the Vermont Supreme Court issued its ruling below without the benefit of having read Armco Inc. v. Hardesty, 52 U.S.L.W. 4787 (U.S. June 12, 1984), it has since declined the opportunity to reconsider in light of that case. In Williams v. State, No. 83-139 (Vt. July 9, 1984), denying reh. to No. 83-139 (Vt. June 15, 1984) (decided per curiam on the basis of the opinion in Leverson v. Conway), the Vermont court summarily denied the taxpayer appellants' motion for rehearing, which had cited Armco.

interstate commerce of a state tax, the proper analysis is to evaluate the "internal consistency" of the tax --"'that is the [tax] must be such that, if applied by every jurisdiction' there would be no impermissible interference with free trade." Armco Inc. v. Hardesty, 52 U.S.L.W. 4787, 4789 (U.S. June 12, 1984) (quoting from Container Corp. of America v. Franchise Tax Board, 103 S.Ct. 2933, 2942 (1983)).

A 'compensating' use tax that affords no credit for sales tax paid another state is not 'internally consistent.' If every state in the Union adopted such a tax, every out-of-state purchase would be subject to multiple taxation; every taxpayer would face an incentive to buy in-state. Such a tax

"overcompensates;" it does not reduce barriers to neutral economic decision-making, but increases them. By contrast, a true compensating use tax, one that affords credit for sales tax paid another state, reduces tax-motivated decisionmaking and allows consumers to decide on the basis of legitimate commercial considerations, such as price, quality, and the time and place of the buyer's need for the goods.

II. THE SECOND QUESTION IS SUBSTANTIAL.

Vermont gives its residents of longstanding a use tax credit for sales tax paid on motor vehicles bought out of state, provided the state of purchase would afford a similar credit.[3] Vt.

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[3]Wisconsin affords such a credit. Wis. Stat. § 77.53(16); see infra, p. 5a.

Stat. Ann. tit. 32, § 8911(9). It denies that credit to 'flatlanders'[4] who bring with them cars bought before they become Vermont residents.

The court below correctly stated the applicable rule of law: "The right to travel has been recognized by the United States Supreme Court as a right that 'protects new residents of a state from being disadvantaged because of their recent migration or from otherwise being treated differently from longer term residents.'" Infra, p. 8a (quoting from Zobel v. Williams, 457 U.S. 55, 60 n.6 (1982)). The remainder of the opinion of the court below completely

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[4]A term of derision some Vermont natives use to refer to persons from out of state.

ignores that recent pronouncement of this Court. See infra, pp. 8a-24a, passim.

The court below reasoned that appellant suffered no penalty on his move to Vermont because he would not have been subject to Vermont's discriminatory use tax had he not sought to drive his car:

> [Appellant] was free to move about the state in public or private conveyance (other than the station wagon) without restriction or penalty, and he was free to obtain a Vermont driver's license without having to pay any use tax on his vehicle. Only when plaintiff sought the privilege of operating that vehicle on Vermont's highways was he required to register it; registration, not the move to Vermont, triggered the use tax obligation. Had plaintiff not sought to register the vehicle, he would have been under no obligation to pay a use tax on it.

Infra, pp. 12a-13a. By the same process of logical legerdemain, it could be said

that the interstate migrants in Shapiro v. Thompson, 394 U.S. 618 (1969), or Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974), suffered no penalty on their migration; only when they applied for the privileges of receiving welfare benefits or free asthma treatments was the discrimination at issue in those cases triggered. Had they not sought welfare benefits or free asthma treatments, they would not have been discriminated against.

If reasoning such as this is allowed to stand, Shapiro v. Thompson will be a dead letter.

Whether analyzed under the Equal Protection Clause, under Article IV's Privileges and Immunities Clause or under the right to travel that has been linked with both of those clauses,

Vermont's failure to extend its new residents the same credit it gives residents of longstanding plainly raises a substantial federal question meriting plenary review by this Court.

CONCLUSION

It has been nearly fifty years since Justice Cardozo wrote that "[i]t will be time enough to mark [the limits to a state's taxing power] when a taxpayer paying in the state of origin is compelled to pay again in the state of destination." Henneford v. Silas Mason Co., 300 U.S. 577, 587 (1937). That time has come. Vermont's use tax raises a second important constitutional question: only 'flatlanders' who move to Vermont, and not Vermont's natives, are "compelled to pay again." This Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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APPENDIX A

VERMONT SUPREME COURT

No. 83-157

Leonard G. Leverson,

Plaintiff-appellant,

v.

William H. Conway, Commissioner, Vermont Department of Motor Vehicles,

Defendant-appellee.

Filed June 15, 1984

GIBSON, J. On May 29, 1982, while residing in Wisconsin, plaintiff purchased a 1979 Subaru station wagon for the sum of $4325. He paid a five percent sales tax of $216.25 to the state of Wisconsin. In July 1982 plaintiff moved to Vermont. Upon registering his vehicle in Vermont in August 1982, plaintiff was required to pay a use tax

of $112 as a condition of registation. The use tax, computed at the rate of four percent on a low book value of $2800 as of the date of registration was paid by plaintiff under protest. Subsequently, plaintiff brought suit to recover the $112. The matter was submitted to the small claims court on an agreed statement of facts. Upon the entry of judgment for defendant, plaintiff appealed, presenting the following issues for our consideration.

> (1) Whether the Vermont motor vehicle purchase and use tax (32 V.S.A. § 8901 et seq.) violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution by its failure to afford to a new resident credit for the sales tax paid on an automobile purchased, used, and registered in a former state of residence;
>
> (2) Whether the Vermont motor vehicle purchase and use tax

violates the Proportional Contribution Clause (Ch. I, Art. 9) of the Vermont Constitution by its failure to afford to a new resident credit for the sales tax paid on an automobile purchased, used, and registered in a former state of residence;

(3) Whether the Vermont motor vehicle purchase and use tax violates the Privileges and Immunities Clause of Article IV, § 2, cl. 1 of the United States Constitution by its failure to afford to a new resident credit for the sales tax paid on an automobile purchased, used, and registered in a former state of residence; and

(4) Whether the Vermont motor vehicle purchase and use tax violates the Commerce Clause (Art. I, § 8, cl. 3) of the United States Constitution by its failure to afford to a new resident credit for the sales tax paid on an automobile purchased, used, and registered in a former state of residence.

32 V.S.A. § 8903 imposes a tax of four percent, or $600, whichever is smaller, upon the purchase and use of motor vehicles within the State of

Vermont. The tax is payable by residents of the state at the time of purchase, id. § 8903(a), or, if the vehicle is purchased out-of-state, at the time the vehicle is first registered for use within the state. Id. § 8903(b).

Residents who purchase pleasure cars outside the state and pay a sales or use tax to another state are exempt from paying a use tax to the State of Vermont, at least to the extent of the tax paid the other state, providing the state of purchase has a reciprocal agreement with Vermont that grants a similar credit for Vermont tax paid under similar circumstances. Id. § 8911(9).

Until recently, a nonresident who purchased, registered and used his

pleasure car in another state for at least thirty days was also granted an exemption; however, that exemption was repealed effective September 1, 1980. 1979 No. 202 (Adj. Sess.), § 3, Pt. VI, eff. Sept. 1, 1980 (repealing 32 V.S.A. § 8911(6)). As a result of the repeal, a nonresident who moves to Vermont and desires to register his motor vehicle here must pay the State of Vermont a use tax of four percent of the fair market value of his vehicle as of the time of registration. Although Wisconsin is a state that has a reciprocal agreement with the State of Vermont, the plaintiff, as a person who purchased his vehicle while a resident of Wisconsin and registered and used it in that state for more than thirty days, is not entitled to an exemption in light of the 1980 repeal.

The purpose of the motor vehicle purchase and use tax is to pay for improvement and maintenance of the state and interstate highway systems. 32 V.S.A. § 8901. The use tax, an important complement to the sale [sic] tax, is designed "to protect a state's revenues by taking away the advantages to residents of traveling out of state to make untaxed purchases, and to protect local merchants from out-of-state competition which, because of its lower or nonexistent tax burdens, can offer lower prices." Rowe-Genereux, Inc. v. Department of Taxes, 138 Vt. 130, 133-34, 411 A.2d 1345, 1347 (1980). The power of a state to establish a non-discriminatory tax on the user of goods brought from another state has long been firmly established.

Henneford v. Silas Mason Co., 300 U.S. 577 (1937).

Sales and use taxes are different in concept, and they are assessed upon different transactions.

> A sales tax is a tax upon the freedom to purchase . . . . A use tax is on the enjoyment of that which was purchased. . . Though sales and use taxes may secure the same revenues and serve the same complementary purposes, they are . . . taxes on different transactions and for different opportunities afforded by a State.

McLeod v. Dilworth, 32 U.S. 327, 330-31 (1944). Because the taxes are intended to complement one another, a person who has paid a tax upon the purchase of a motor vehicle in Vermont is not subject to the payment of a use tax to the state. 32 V.S.A. § 8903(b).

I.

We first consider whether Vermont's motor vehicle purchase and use tax

violates the Equal Protection Clause. Plaintiff claims that the use tax adversely affects his right to travel and that any infringement of this fundamental right must be viewed with "strict scrutiny" by the courts. The right to travel has been recognized by the United States Supreme Court as a right that "protects new residents of a state from being disadvantaged because of their recent migration or from otherwise being treated differently from longer term residents." Zobel v. Williams, 457 U.S. 55, 60 n.6 (1982) (citing Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974)). See also Memorial Hospital v. Maricopa County, supra, (one-year county residency requirement for non-emergency medical benefits struck down as penalizing exercise of right to

travel without the showing of a sufficient state interest in justification); Dunn v. Blumstein, 405 U.S. 330 (1972) (one-year residency requirement to vote in state election rejected on ground that no compelling state interest was shown to justify the penalty imposed as a result of the exercise of the right to travel); Shapiro v. Thompson, 394 U.S. 618 (1969) (one-year residency requirement to qualify for welfare benefits struck down on ground that no compelling governmental interest had been shown in justification of the state action penalizing the exercise of the right to travel).

The "strict scrutiny" test is invoked upon a showing of some penalty resulting from the exercise of a fundamental right, such as the right to travel; there is no requirement of a

showing that a person was deterred from traveling, only that there was a penalty for doing so. Dunn v. Blumstein, supra, 405 U.S. at 340. Under the strict scrutiny test, "any classification which serves to penalize the exercise of . . . [a fundamental] right, unless shown to be necessary to promote a compelling governmental interest, is unconstitutional." Shapiro v. Thompson, supra, 394 U.S. at 634 (emphasis in original).

Ordinarily, when this Court is called upon to determine whether a tax law violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, the Court is required to impose "only the minimum scrutiny of the so-called 'rational basis test'." Hadwen, Inc. v. Department of Taxes, 139 Vt. 37, 42, 422 A.2d

255, 258 (1980). See Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522, 527 (1959). "This test . . . permits a determination of unconstitutionality only where the relevant law classifies similar persons for different treatment upon wholly arbitrary and capricious grounds. . . . Where the classification rests upon 'some reasonable consideration of legislative policy,' it will not be found unconstitutional." Hadwen, Inc. v. Department of Taxes, supra, 139 Vt. at 42, 422 A.2d at 258-59 (citing Andrews v. Lathrop, 132 Vt. 256, 259, 315 A.2d 860, 862 (1974)); Allied Stores of Ohio, Inc. v. Bowers, supra, 358 U.S. at 527.

Plaintiff complains that the court below erroneously used the "rational basis" test, applying an insufficient standard to his complaint, and that had

the "strict scrutiny" test been applied, the use tax, which plaintiff paid under protest, would have been declared an unconstitutional infringement of plaintiff's right to travel under the Equal Protection Clause, entitling plaintiff to recover the $112 he paid to the state.

Plaintiff misconceives the nature of the right he seeks to invoke. His right to travel has not been infringed. He suffered no restrictions on his right to travel to Vermont and incurred no penalty as a result of the exercise of this right. He was free to bring his property, including his station wagon, to Vermont without incurring any penalty as a result. He was free to move about the state in public or private conveyance (other than the station wagon)

without restriction or penalty, and he was free to obtain a Vermont driver's license without having to pay any use tax on his vehicle. Only when plaintiff sought the privilege of operating that vehicle on Vermont's highways was he required to register it; registration, not the move to Vermont, triggered the use tax obligation. Had plaintiff not sought to register the vehicle, he would have been under no obligation to pay a use tax on it.

In Wells v. Malloy, 402 F. Supp. 856 (D. Vt. 1975), affirmed without opinion 538 F.2d 317 (2d Cir. 1976), the plaintiffs challenged the constitutionality of the statute providing for suspension of their right to drive following nonpayment of the automobile purchase and use tax. Rejecting plaintiffs' claim, the court held, "[a]lthough

a driver's license is an important property right to this age of the automobile, it does not follow that the right to drive is fundamental in the constitutional sense." Id. at 858. Accord Montgomery v. North Carolina Dept. of Motor Vehicles, 455 F. Supp. 338, 342 (W.D.N.C 1978) (revocation of driver's license for refusal to submit to chemical tests does not deprive licensee of any fundamental constitutional right).

As was stated in Wells v. Malloy, supra, 402 F. Supp. at 859,

> 'Vermont may no longer be thought of as having only dirt roads and an inadequate transportation and highway system.' (quoting Miller v. Malloy, 343 F. Supp. 46, 50 (D. Vt. 1972)). It is certainly possible to get from place to place using public transportation or by taking advantage of friends or family members.

In analyzing the argument that suspension of the right to drive is "beyond the pale of fair and just collection techniques" and that the State should be limited to refusing to register a motor vehicle when the purchase and use tax is not paid, the court stated,

> The issue is really whether it is easier to find someone to drive one's own car if one cannot drive, or to obtain a registered automobile for one's own use if one can drive but has no other car. Seen in this light, we cannot conclude that suspension of driving privileges is any more harsh or coercive than refusal to register a motor vehicle . . . .

Id. at 862. We agree and conclude that the plaintiff's right to register his motor vehicle does not rise to the level of a fundamental constitutional right, nor does it implicate the fundamental right to travel. Since no fundamental

right is involved, the applicable standard for measuring the constitutionality of Vermont's statute is the "rational basis" test.

As stated earlier, under the "rational basis" test we may find a statute unconstitutional "only where the relevant law classifies similar persons for different treatment upon wholly arbitrary and capricious grounds." Hadwen, Inc. v. Department of Taxes, supra, 139 Vt. at 42, 422 A.2d at 259. Since the purpose of the purchase and use tax is to pay for the maintenance and improvement of the state and interstate highway systems, 32 V.S.A. § 8901, the tax bears an obviously reasonable relationship to the services provided, namely, the privilege of using those highways.

The Legislature has chosen to grant certain exemptions from the purchase and

use tax, see 32 V.S.A. § 8911(1)-(13); all non-exempt persons must pay the four percent tax. Among the legislative exemptions -- and the only one pertinent hereto -- is one for residents who pay a sales or use tax elsewhere on pleasure cars acquired outside Vermont, providing the state or province collecting the tax "would grant the same pro-rata credit for Vermont tax paid under similar circumstances." Id. § 8911(9).

We note that the Vermont motor vehicle purchase and use tax does not apply to most nonresidents. Those non-residents who come into the state to purchase a vehicle and then leave immediately to return to their home states do not have to pay a purchase or use tax to Vermont. See id. § 8903(a) (purchase tax is payable "by a resident"). Those

who must pay either a purchase tax or the compensating use tax include residents who purchase in Vermont, id. § 8903(a); residents who register cars purchased outside Vermont in a state or province that would grant no pro-rata credit for any Vermont purchase or use tax paid by one of its residents, id. § 8903(b); persons such as plaintiff who move into Vermont and then register cars acquired before they became residents of the state, see id. § 8903(a), (b); persons who accept employment or engage in a trade, profession or occupation in Vermont for a period of at least six months and purchase a car here or operate one for more than 30 days, id. §§ 8902(2), 8903(a), (b), 23 V.S.A. §§ 4(30), 301; and any foreign partnership, firm, association or corporation doing business in the state and using

vehicles in the state in connection with its business, 32 V.S.A. §§ 8902(2), 8903(a), (b), 23 V.S.A §§ 4(30), 301.

Thus, Vermont's basic policy is clear: those who use the state's highways must contribute toward their maintenance and improvement. It is also the state's policy to encourage residents to support the local economy by refusing to grant credit for taxes paid to any non-reciprocating state or province. The only exemption under the state's policies is for residents who buy in reciprocal states and cannot avoid paying a sales or use tax to such states. The exemption appears to be based upon a policy of encouraging out-of-staters from reciprocal states to purchase their vehicles in Vermont and pay a sales tax to Vermont, secure in

the knowledge that they will not be subject to a duplicate tax in their home states, and upon a legislative assumption that few, if any, tax dollars will be lost through this exercise in comity. Whether the amount of highway tax raised in Vermont in this manner exceeds or falls below the amount lost to other states through the reciprocal arrangement does not appear of record; nevertheless, the exempt classification is based on a reasonable legislative policy or purpose, and, unless wholly arbitrary, must be upheld. Allied Stores of Ohio, Inc. v. Bowers, supra, 358 U.S. at 527; Hadwen, Inc. v. Department of Taxes, supra, 139 Vt. at 42, 422 A.2d at 259.

As mentioned, the exemption is not available to residents who acquire cars in states having no reciprocal agreement

with Vermont; nor is the exemption available to new residents, such as plaintiff, who, subsequent to acquiring their vehicles, move to Vermont and seek to register them here. A change in the law so as to provide an exemption to either group would run counter to the state's present policies of requiring user contributions and encouraging purchases within the state, and would result in the loss of tax revenues to the state. With respect to new residents, such as plaintiff, who bring their cars with them, they are beyond the reach of any policy of encouragement to purchase in this state, and there is no reason to exempt them from making a fair contribution to the maintenance and improvement of Vermont's highways. Under the present statutory scheme,

plaintiff pays the same tax and is treated in exactly the same manner as all non-exempt persons, including the resident who purchases his vehicle in a nonreciprocal state.

It is also necessary to keep in mind that § 8911(9) is an exemption from the payment of taxes, and exemptions are construed strictly, with no claim of exemption to be allowed unless shown to be within the necessary scope of the statute. Rock of Ages Corp. v. Commissioner of Taxes, 134 Vt. 356, 359, 360 A.2d 63, 65 (1975). "A state, for many purposes, is to be reckoned as a self-contained unit, which may frame its own system of burdens and exemptions without heeding systems elsewhere." Henneford v. Silas Mason Co., supra, 300 U.S. at 587. The fact that plaintiff does not qualify as a member of the

exempt class does not deprive him of the equal protection of the law. Storaasli v. Minnesota, 283 U.S. 57, 62 (1931). "[T]he exemption is a proper and lawful one, and [plaintiff] cannot make out a discrimination against him from the mere fact that he is not in a position to claim it." Id.

We conclude that the exempt classification established by the Legislature is rationally related to a legitimate purpose of state government, namely, the promotion of commerce within the state and the raising of taxes to help maintain and improve the state and interstate highway system, and that the classification is not an arbitrary one. Accordingly, we find no violation of the Equal Protection Clause of the

Fourteenth Amendment to the United States Constitution.

II.

The Proportional Contribution Clause of the Vermont Constitution has been construed to be the practical equivalent of the Equal Protection Clause. Pabst v. Commissioner of Taxes, 136 Vt. 126, 131 n.2, 132-33, 388 A.2d 1181, 1184 (1978); In re Estate of Eddy, 135 Vt. 468, 472, 380 A.2d 530, 533-34 (1977). For the same reasons stated in Part I above, we conclude that there has been no violation of the Proportional Contribution Clause.

III.

Plaintiff also contends that 32 V.S.A. § 8909 violates the Privileges and Immunities Clause of Article IV of of the United States Constitution by

failing to extend to new residents a credit for sales tax previously paid other States. Before this Court may apply the Clause to § 8909, however, we must first decide "whether the [statute] burdens one of those privileges and immunities protected by the Clause." United Building and Construction Trades Council of Camden County and Vicinity v. Mayor and Council of the City of Camden, 52 U.S. L. W. 4187, 4190 (U.S. February 21, 1984) (No. 81-2110) (citing Baldwin v. Montana Fish and Game Commission, 436 U.S. 371, 383 (1978)). "Only with respect to those 'privileges' and 'immunities' bearing upon the vitality of the Nation as a single entity must the State treat all citizens, resident and nonresident, alike." Baldwin

v. Montana Fish and Game Commission, supra, 436 U.S. at 383. Thus the Privileges and Immunities Clause will not come into play unless a basic or fundamental right is involved.

Plaintiff argues that his right to travel is infringed by the requirement that he pay a use tax to register his vehicle, without being granted the same exemption or credit afforded to state residents. As we have previously noted, the right to travel, although a fundamental right, Shapiro v. Thompson, supra, 394 U.S. at 630, is not involved herein. Accordingly, the Privileges and Immunities Clause of the United States Constitution does not come into play and there has been no violation of that constitutional clause.

IV.

Finally, plaintiff invokes the Commerce Clause in support of his cause, contending that Vermont's purchase and use tax discriminates against interstate commerce by failing to provide equal treatment for out-of-state purchases.

In order for the Commerce Clause to apply, the transaction at issue must be one that comes within the scope of interstate commerce. Because "interstate commerce" is a term of such wide implications and ramifications the courts have carefully avoided any attempt to give it a comprehensive definition. Gross Income Tax Div. v. J. L. Cox & Son, 227 Ind. 468, 475, 86 N.E.2d 693, 696 (1949).

Generally speaking, the indispensable element in interstate commerce is

the importation of people or goods, even one's own goods, into one state from another. Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 255-56 (1964); United States v. Hill, 248 U.S. 420, 423-24 (1919). Whether the movement is commercial in nature is immaterial. Heart of Atlanta Motel, Inc. v. United States, supra, 379 U.S. at 256. It has long been settled that when personal property has been brought into a state and come to a permanent rest, or merely halted for a moment before resuming its interstate journey, taxes upon the privilege of use, storage or consumption within the state do not impose an unconstitutional burden on interstate commerce. General Trading Co. v. State Tax Commission, 322 U.S.

335, 338 (1944); Henneford v. Silas Mason Co., supra, 300 U.S. at 582-83; Brown v. Houston, 114 U.S. 622, 633 (1885). In the words of Justice Cardozo, "A tax upon the privilege of use or storage when the chattel used or stored has ceased to be in transit is now an impost so common that its validity has been withdrawn from the arena of debate." Henneford v. Silas Mason Co., supra, 300 U.S. at 583.

There can be no doubt that at all relevant times herein plaintiff and his vehicle had ceased to be in transit. His intention was to move to Vermont, and at the time he sought to register the vehicle both he and the vehicle had come to rest in Vermont. Plaintiff's station wagon had become "part of the common mass of property within the state

of destination," id. at 582, and was thus clearly an appropriate subject for the imposition of a non-discriminatory use tax in Vermont. There has been no violation of the Commerce Clause. Affirmed.

FOR THE COURT:

/s/ Ernest W. Gibson III
Associate Justice

APPENDIX B

DISTRICT COURT OF VERMONT

UNIT NO. 1, RUTLAND CIRCUIT

DOCKET NO. 697-82Rs

LEONARD G. LEVERSON

v.

WILLIAM H. CONWAY,
Commissioner of Motor Vehicles

Filed March 28, 1983

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This matter came on before the Court on Plaintiff's complaint to recover $112.00 paid to the Commissioner of Motor Vehicles pursuant to 32 V.S.A. Section 8903(b). Plaintiff is a law school graduate and proceeded pro se. Andrew Eschen, Esq., represented the Commissioner of Motor Vehicles. The parties appeared without a written

record and submitted the case on an agreed statement of facts as well as written memorandum.

The Defendant filed a Motion to Dismiss, a motion not recognized under D.C.C.R. 80.3 governing Small Claims Procedure. However captioned, the Defendant's motion was in essence an answer under the informed procedure of D.C.C.R. 80.3(e).

Based upon the facts as stipulated to and the memorandum, the Court makes the following Findings of Fact, Conclusions and Order.

FACTS

1. The Plaintiff, Leonard G. Leverson, bought a 1979 Subaru wagon on May 29, 1982, with a delivery date, June 4, 1982 in West Allis, Wisconsin.

2. He registered the car in

Wisconsin, effective June 4, 1982.

3. The purchase price was $4,325.00.

4. The Plaintiff paid, in addition, a 5% Wisconsin sales tax of $216.25.

5. During the periods identified in paragraphs 1-4, supra, the Plaintiff was a legal resident of Waukesha, Wisconsin, where he voted, and held a job in Milwaukee.

6. The Plaintiff knew in mid-September of 1981, while a legal resident of Wisconsin but living in Massachusetts, that he would be moving to Vermont at the start of July, 1982, since he accepted a one-year job in Vermont at that time.

7. The Plaintiff knew in mid-

October of 1981, while a legal resident of Wisconsin, but living in Massachusetts, that he would be working in Wisconsin as a summer clerk for a law firm for four and one-half weeks in May and June of 1982.

8. The Plaintiff, though a legal resident of Wisconsin, lived in Massachusetts until late May of 1982.

9. The Plaintiff bought a car in Wisconsin rather than Vermont because it was more convenient for him to buy it in Wisconsin. He drove it from Waukesha, Wisconsin to Pittsford, Vermont with his car packed full of his belongings on a Friday and Saturday in late June of 1982. Early the following Sunday morning he drove straight to Cambridge, Massachusetts, where he rented a van. During the next several days, Sunday night, Monday and Tuesday--he made two

trips in the van and two trips in his own car to move his own belongings from Cambridge, Massachusetts to Pittsford, Vermont.

10. At the time the Plaintiff purchased his car in Wisconsin he was ignorant of the details of Vermont's motor vehicle purchase and use tax.

11. On July 1, 1982, the Plaintiff began employment in Rutland, Vermont; he had also been in the office where he is currently employed on June 30, 1982.

12. The Plaintiff registered to vote in Pittsford, Vermont in early July, 1982.

13. The Plaintiff obtained a Vermont driver's license, #50811590, in July of 1982.

14. On August 2, 2982, the Plaintiff filed an application for registra-

tion of his car with the Defendant Commissioner of Motor Vehicles.

15. The Plaintiff paid registration and title fees without objection, but he clearly indicated on the application and in an accompanying letter, that he was paying under protest the $112.00 use tax required as a condition of registration. The $112.00 figure was reached, and actually written on the application form, by an agent of the Defendant at the Rutland office of the Department of Motor Vehicles who calculated that figure by computing a $4 [sic] tax on $2,800 "low book value" for the car.

16. The Defendant informed the Plaintiff by letter dated August 12, 1982 that, "Replying to your letter of August 2, 1982, it is my opinion that until such time as the repeal of this

particular section has itself been addressed and the legislative action been declared invalid, I have no authority to grant a refund."

17. The action was commenced against William H. Conway solely in his official capacity.

DISCUSSION OF ISSUES

This matter has been submitted to the Court on an agreed statement of facts. Both parties waived oral argument on the record and relied on their Memorandum.

This is a case of first impression in Vermont. Other states have recently considered the question. In re J.C. Penney Company, Inc. v. Hardesty, 264 S.E.2nd. 604 (W.Va.)(1980).

In this case the Plaintiff urges a refund on three grounds. These involve

the Constitutional issues of Privileges and Immunities, Equal Protection, and the Commerce Clause.

The tax in question is a use tax in both form and substance. Its purpose is to pay for improvement and maintenance of the State highway system. 32 V.S.A. Section 8901. It is payable either at the time the purchaser buys a motor vehicle in Vermont or at the time the vehicle is registered, if it is purchased out of state. See 32 V.S.A. Section 8903(a) and (b).

Plaintiff initially paid a sales tax of $216.25 to the State of Wisconsin which was based upon the sales price of the motor vehicle. Sales and use taxes were distinguished by Justice Frankfurter in McLeod v. Dilworth, 322 U.S. 327 (1949). In that decision the following is stated:

> "A sales tax and use tax in many instances bring about the same result. But they are different in conception, they are assessments upon different transactions. . . A sales tax is a tax upon the freedom to purchase, a freedom which wartime restrictions serve to emphasize. A use tax is on the enjoyment of that which was purchased. . . Though sales and use taxes may secure the same revenues and serve the same complimentary [sic] purposes they are, as we have indicated, taxes on different transactions and for different opportunities afforded by a state." 322 U.S. at 330-31.

Plaintiff initially claims that the tax violates the Commerce Clause of the United States Constitution, Article I, Section 8, Clause 3 because it unfairly discriminates against out-of-state purchases.

The Supreme Court has not decided whether the Commerce Clause requires a State to credit, against its own use tax, a sales tax paid to another state. L. Tribe, American Constitutional Law,

Sections 6-16 at p. 359 (1978).

McGoldrick and Western Live Stock v. Bureau of Revenue, 303 U.S. 250 (1938) emphasized that interstate commerce must pay its own way. In this case, Vermont is imposing a reasonable fee for the use of Vermont highways, with the costs attending their construction and maintenance. The services rendered by Vermont are conceptually and practically different from those rendered by Wisconsin.

The issue raised by Plaintiff here was addressed in dictum in Justice Cardozo's opinion in Henneford v. Silas Mason Company, 300 U.S. 577 (1937). In that case, the Court upheld a 2% use tax imposed on equipment brought into Washington State for the building of the Grand Coulee Dam. The Washington

use tax, like Vermont's Section 8903, provided a credit for sales tax paid in Washington. Unlike Vermont's tax, Washington also provided a credit for sales tax paid in other states. Justice Cardozo noted:

> "Yet a word of caution should be added here to avoid the chance of misconception. We have not meant to imply by anything said in this opinion that allowance of a credit for other taxes paid Washington made it mandatory that there should be a like allowance for taxes paid to other states. A state, for many purposes, is to be reckoned a self-contained unit which may frame its own system of burdens and exemptions without heeding systems elsewhere."

300 U.S. at 587.

Justice Brennan repeats this caution in his concurrance in Halliburton Oil Well Company v. Reilly, 373 U.S. 64 at 76-77 (1963).

The Henneford decision warns that

the Commerce Clause does not compel states to subsidize businesses engaged in interstate commerce by giving up their own legitimate revenues in deference to other states.

This raises the question of standing. In J.C. Penney Co., Inc. v. Hardesty, 264 S.E.2nd. 604 (W.Va.) (1980), a resident of New Jersey purchased an automobile in that state and subsequently moved to West Virginia. She also did not receive a credit when she paid the West Virginia tax. That Court held at 264 S.E.2nd. at 614-15 that:

> "Since [Plaintiff] is not herself engaged in interstate commerce in her capacity as a driver of a motor vehicle . . . the requirement of fair apportionment does not apply to her."

Thus, since the Plaintiff here stands in

the same shoes as the Plaintiff in Penney, there is a serious question as to whether or not the Plaintiff has standing. In addition, Vermont's use tax is a reasonable charge for services made available to the Plaintiff. Payment while an additional cost does not amount to an impermissible burden on interstate commerce.

Plaintiff next claims that the Vermont tax violates the Privileges and Immunities Clause of the U.S. Constitution because it burdens the fundamental right to travel and it is in effect a tax on the right to ingress into Vermont.

The case Plaintiff cites, Shapiro v. Thompson, 394 U.S. 618 (1969) and Hicklin v. Orbeck, 437 U.S. 371 (1978), involves situations where a newcomer to

a state is not recognized as a resident and is therefore denied welfare benefits (in Shapiro) or job (in Hicklin). In this case, Plaintiff claims the reverse of the Shapiro and Hicklin situations. Here Plaintiff, when he established his residency, was taxed as a resident and Vermont imposed a resident's obligation on him. It measured the tax based upon the value of the car at the time he established his residence, not based upon the price at the time of purchase.

Plaintiff's residence is constitutionally irrelevant to Vermont's right to impose a use tax for the use of his car on Vermont roads. Thus in Kane v. New Jersey, 242 U.S. 160 (1916), the Court upheld a New Jersey statute requiring residents and non-residents

alike to register cars driven in New Jersey in that state. Similarly, a state may charge a tax, based on a vehicle's value, for its operation by a non-resident within the taxing state. Storaasli v. Minnesota, 283 U.S. 57 (1931).

The Vermont registration statutes, 23 V.S.A. Section 4(30) and Section 301, which triggered Plaintiff's use tax liability, provide him more protection than the constitution requires. Under the statute, the Defendant [sic] must register only if he is a "legal resident" or is employed for more than six months in the state. Plaintiff conceded that at the time he registered his car, he had registered to vote in Pittsford, Vermont. From his registration to vote, the Court may infer that he was a legal

resident of Vermont, i.e., that he was living in Vermont with the intention to remain indefinitely. 17 V.S.A. Section 2122(b). Defendant [sic] also concedes that he accepted a one-year job in Rutland beginning July, 1982. Either fact qualified him as a resident under 23 V.S.A. Section 4(30). The statute does not treat him any differently than it treats long-time residents of this state.

In sum, where the use tax assessed against Plaintiff does not constitutionally require residency, and the Vermont Statutes do not discriminate against him on the basis of his current or former residence, Plaintiff's Privilege and Immunities Claim is unavailing.

Plaintiff challenges 32 V.S.A.

Section 8911(9) as a violation of the equal protection clause of the Fourteenth Amendment of the U.S. Constitution. The statute provides in relevant part:

> The tax imposed by this chapter shall not apply to:
>
> (9) pleasure cars acquired outside the state by a resident of Vermont on which a state sales or use tax has been paid by the person applying for a registration in Vermont, providing that the state or province collecting such tax would grant the same pro-rata credit for Vermont tax paid under similar circumstances.

The Court must construe a statute to uphold its constitutionality whenever possible. U.S. v. Vuitch, 402 U.S. 62 (1971). If the statute is susceptible of multiple constructions, the Court must adopt the construction that renders the statute constitutional. Reed v. Allen, 121 Vt. 202; 153 A.2d. 74 (1959).

The Court must also consider Section 8911(9) in the context of Chapter 219 as a whole.

In this light, the import of the term "resident" or "person applying for registration in Vermont" is clear. Only a person who is or becomes a resident under 32 V.S.A. Section 8902 and 23 V.S.A. Section 301 has any duty to register his car or pay a tax on it in Vermont. Non-residents are not denied a tax credit under this statute for the simple reason that they have no tax liability to which a credit could be applied.

At the time Plaintiff applied for a Vermont registration, he was a Vermont resident. He was not denied a tax credit on the basis of his residency

under Section 8911(9). He was denied a credit because the state that took his sales tax had no reciprocal agreement with Vermont. The statute does not create a tax classification based on residency; the classification is based on the presence or absence of reciprocity in the state where a vehicle is purchased.

Welch v. Henry, 305 U.S. 134 (1938), in rejecting an equal protection attack on a state tax classification, stated the familiar rule that "any classification of taxation is permissible which has a reasonable relation to a legitimate end of governmental action." 305 U.S. at 144. As noted earlier, Vermont is not constitutionally required to give credit against its use tax for tax paid to other forums.

However, Vermont legislators could reasonably believe that granting a credit to reciprocating status [sic] would promote commerce without a one-sided sacrifice of revenue on Vermont's part. In the absence of pre-emptive federal legislation, a state's encouragement of commerce is a legitimate goal. Whether Section 8911(9) is a necessary or effective means of reaching this goal is a legislative decision, not a judicial one. Olsen v. Nebraska, 313 U.S. 236, 246 (1941).

In sum, the challenged statute does not create a classification based on residency. The statute concedes part or all of the use tax, to which Vermont has a legitimate claim, for the equally

legitimate purpose of promoting an even-handed commerce between Vermont and reciprocating states. The statute is reasonably related to its purpose and therefore does not offend the equal protection clause.

For the reasons discussed, the statute is not "purely arbitrary and irrational" and therefore does not violate Chapter I, Article 9, of the Vermont Constitution. In re Estate of Eddy, 135 Vt. 468, 472-73; 380 A.2d. 530, 534 (1977).

Factors not made clear by the statement of facts is where in fact the Plaintiff resided at the time of these various transactions. The statement of facts, number 5, indicate that he was a legal resident of Waukesha, Wisconsin, where he voted and held a job. The

Court recognizes that residents and domicil are not synonymous and it may well have been that, if in fact the Plaintiff had rented an apartment in Pittsford during that period, that he may well have been a resident of Vermont at the time he paid Wisconsin's sales tax. It also may have been the fact, although not before the Court, that the Plaintiff had sufficient contacts to establish residency in Vermont at that time in any event. If that was the case and the Plaintiff was a resident at the time he purchased and paid the tax in Wisconsin, then there will be a question of standing. In any event, the Court concludes that based upon the fats and conclusions as set forth herein, that judgment be entered for

the Defendant.

ORDER

Judgment for the Defendant.

Dated at Rutland, County of Rutland and State of Vermont this 28 day of March, 1983.

/s/ Francis B. McCaffrey
Francis B. McCaffrey
District Judge

APPENDIX C

VT. SUPREME COURT
FILED IN CLERK'S OFFICE
JUNE 15, 1984

ENTRY ORDER

NOVEMBER TERM, 1983

LEONARD G. LEVERSON,

Appellant,

v.

WILLIAM H. CONWAY, COMMISSIONER, VERMONT DEPARTMENT OF MOTOR VEHICLES,

Appellee.

Appealed From:
District Court of Vermont
Unit No. 1, Rutland Circuit
Docket No. 697-82Rs

In the above entitled cause the Clerk will enter:

Affirmed.

FOR THE COURT:

/s/Ernest W. Gibson III
Ernest W. Gibson III,
Associate Justice

Concurring:

/s/Franklin S. Billings, Jr.
Franklin S. Bilings, Jr.
Chief Justice

/s/William C. Hill
William C. Hill,
Associate Justice

/s/Wynn Underwood
Wynn Underwood
Associate Justice

/s/Louis P. Peck
Louis P. Peck,
Associate Justice

APPENDIX D

IN THE SUPREME COURT OF VERMONT

LEONARD G. LEVERSON,

Plaintiff-Appellant,

v. Docket No. 83-157

WILLIAM H. CONWAY,
Commissioner, Vermont
Department of Motor Vehicles,

Defendant-Appellee.

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Leonard G. Leverson, the plaintiff-appellant above-named, hereby appeals to the Supreme Court of the United States from the final order of the Supreme Court of Vermont, entered on June 15, 1984, affirming judgment for defendant-appellee.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

Leonard G. Leverson
777 East Wisconsin Avenue
Milwaukee, Wisconsin 53202-5367
414-271-2400
Pro se

[Proof of Service]

APPENDIX E

STATUTORY PROVISIONS INVOLVED

Vt. Stat. Ann. tit. 32, § 8901:

This is an act to impose a purchase and use tax on motor vehicles in addition to any other tax or registration fees. The purpose of this chapter is to thereby improve and maintain the state and interstate highway systems, to pay the principal and interest on bonds issued for the improvement and maintenance of those systems and to pay the cost of administering this chapter. The administration of this chapter is vested in the commissioner of motor vehicles and his authorized representatives. The commissioner may prescribe and publish regulations to carry into effect the

provisions of this chapter, which regulations, when reasonably designed to carry out the intent of this chapter, shall have the same force as if enacted herein.

Vt. Stat. Ann. tit. 32, § 8902(2):

Unless otherwise expressly provided, the words and phrases used in this chapter shall be construed to mean:

. . .

(2) "Resident"--resident shall include all legal residents of this state and in addition thereto any person who accepts employment or engages in a trade, profession or occupation in this state for a period of at least six months. Also in addition thereto any foreign partnership, firm, association or corporation doing business in this state shall be deemed to be a resident

as to all vehicles owned or leased and ordinarily used by it in connection with its place of business in this state. Resident shall not include any person, firm or corporation not required to register motor vehicles by reason of any reciprocity provision with any other state.

. . .

Vt. Stat. Ann. tit. 32, § 8903:

(a) There is hereby imposed upon the purchase in Vermont of a motor vehicle by a resident a tax at the time of such purchase, payable as hereinafter provided. The amount of the tax shall be four percent of the taxable cost of the motor vehicle, or $600.00 for each motor vehicle, whichever is smaller.

(b) There is hereby imposed upon

the use within this state a tax of four percent of the taxable cost of a motor vehicle, or $600.00 for each motor vehicle, whichever is smaller, by a person at the time of first registering or transfering a registration to such motor vehicle payable as hereinafter provided, except no use tax shall be payable hereunder if the tax imposed by subsection (a) above has been paid.

Vt. Stat. Ann. tit. 32, § 8905(b):

. . .

(b) Every person subject to a use tax under subsection (b) of section 8903 of this title shall forward such tax form and the tax due to the commissioner with the registration application or transfer, as the case may be, and fee at the time of first registering or transferring a registration to such motor

vehicle as a condition precedent to registration thereof.

. . .

Vt. Stat. Ann. tit. 32, § 8907:

The commissioner may investigate the taxable cost of any motor vehicle transferred subject to the provisions of this chapter. If the motor vehicle is not acquired by purchase in Vermont or is received for an amount which does not represent actual value, or if no tax form is filed or it appears to the commissioner that a tax form contains fraudulent or incorrect information, he may, in his discretion, fix the value of said motor vehicle at the average book value of the same make, type, model and year of manufacture as designated by the manufacturer as shown in the Official

Used Car Guide, National Automobile Dealers Association (New England edition) or any comparable publication, compute and assess the tax due thereon, and notify the purchaser thereof forthwith by certified mail, and said purchaser shall remit the same within fifteen days thereafter.

Vt. Stat. Ann. tit. 32, § 8909:

If the tax due under subsections (a) and (b) of section 8903 of this title is not paid as hereinbefore provided the commissioner shall suspend such purchaser's right to operate a motor vehicle within the state of Vermont until such tax is paid, and such tax may be recovered with costs in an action brought in the name of the state on this statute.

Vt. Stat. Ann. tit. 32, § 8911:

The tax imposed by this chapter shall not apply to:

(1) motor vehicles owned or registered by any state or province or any political subdivision thereof;

(2) motor vehicles owned and operated by the United States of America;

(3) motor vehicles owned and registered by religious or charitable institutions or volunteer fire companies;

(4) motor vehicles owned and operated by a dealer and registered and operated under the provisions of sections 451-468 inclusive of Title 23;

(5) nonregistered motor vehicles

(6) [Repealed.]

(7) motor vehicles, title to which on the effective date of this chapter is in the owner seeking registration thereof;

(8) motor vehicles transferred to the spouse, mother, father or child of the donor or subsequently transferred among such individuals provided such motor vehicle hs been registered in this state in the name of the original donor;

(9) pleasure cars acquired outside the state by a resident of Vermont on which a state sales or use tax has been paid by the person applying for a registration in Vermont, providing that the state or province collecting such tax

would grant the same pro-rata credit for Vermont tax paid under similar circumstances. If the tax paid in another state is less than the Vermont tax the tax due shall be the difference;

(10) motor vehicles registered in Vermont by the transferor and transferred between that individual and a business entity controlled by him, if the transfer is exempt under section 351 of the United States Internal Revenue Code in effect July 1, 1966;

(11) motor vehicles owned or purchased in another state by a member of the armed forces on full time active duty or his spouse upon which a purchase, use or sales tax has been paid in another state, except that, if that tax is less than the tax payable

in this state but for this subdivision, the tax applies in the amount of the difference;

(12) motor vehicles owned and operated by physically handicapped persons for whom the vehicle's controls have been altered to enable such persons to drive. This exception shall apply only when such handicapped person has ben certified exempt from the tax by the ccommissioner of motor vehicles under the provisions of section 8901 of this title;

(13) motor vehicles obtained from the government as excess government property, or vehicles purchased with 100 percent federal funds and use for federally suported [sic] local programs.

APPENDIX F

QUESTIONS PRESENTED BELOW

1. Is Wisconsin a state that "would grant the same pro-rata credit for Vermont tax paid under similar circumstances" within the meaning of 32 V.S.A. § 8911(9)?

2. Does the Fourteenth Amendment's Equal Protection Clause prohibit Vermont from discriminating against newcomers in the allowance of credits for sales tax paid other States?

3. Does the Proportional Contribution Clause of the Vermont Constitution prohibit Vermont from discriminating against newcomers in the allowance of credits for sales tax paid other States?

4. Does Article IV's Privileges and Immunities Clause prohibit Vermont from discriminating against newcomers

in the allowance of credits for sales tax paid other States?

5. Does Vermont's motor vehicle purchase and use tax, 32 V.S.A. §§ 8903, 8911, impermissibly favor in-state purchases of cars over out-of-state purchases of cars, in violation of the Commerce Clause?

6. Should this court construe the credit provided by 32 V.S.A. § 8911(9) to extend to newcomers to Vermont, so as to save the statute from constitutional infirmity under the Equal Protection, Proportional Contribution, and Privileges and Immunities Clauses, and so as to put off for another day the Commerce Clause question presented?

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No. 84-0315

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

LEONARD G. LEVERSON,

Appellant,

v.

WILLIAM H. CONWAY, COMMISSIONER,
VERMONT DEPARTMENT OF
MOTOR VEHICLES,

Appellee.

ON APPEAL FROM THE SUPREME COURT
OF VERMONT

MOTION TO DISMISS OR AFFIRM

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I. MOTION TO DISMISS OR AFFIRM

Appellee moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Vermont Supreme Court for the following reasons:

1. The case lacks a substantial federal question.

2. The case is not within the appeal jurisdiction of this Court.

II. STATEMENT

Appellant, a new resident of Vermont, has challenged the state's failure to afford him credit toward its automobile use tax, Vt. Stat. Ann. tit. 32, § 8903(b), for the sales tax paid to Wisconsin, his prior state of residence. Under the mistaken assumption that he would have received credit for the sales tax paid Wisconsin "had [he] been a resident of Vermont at the time he purchased his car," Jurisdictional Statement at 5, appellant claims that the denial of credit infringes his right to travel and violates the Commerce Clause, Article I, § 8, cl. 3, the Privileges and Immunities Clause, Article IV, § 2, cl. 1, and Equal Protection Clause, Amendment XIV, § 1, cl. 4. Central to these claims is appellant's misinterpretation of how the tax is calculated and applied, and his unsubstantiated belief that he has been the victim of discrimination by Vermont. Because the tax scheme does not discriminate against new residents, on its face or as applied, and because the decision of the Vermont Supreme Court is clearly correct, a substantial federal question is not presented.

III. ARGUMENT

A. The Vermont Tax Scheme Clearly Does Not Discriminate Against New Residents Who Become Liable For The Motor Vehicle Use Tax, And Thus A Substantial Federal Question Is Not Presented.

An individual who moves to Vermont, who becomes a "resident", Vt. Stat. Ann. tit. 32, § 8902(2), and who desires to use his or her car in this state is required to pay the use tax and to register it here. See Vt. Stat. Ann. tit. 32, §§ 4(30), 302. Until that person becomes a resident, however, he or she has the unlimited right to drive the car on its highways. The liability for the use tax arises only when the person becomes a resident, and the taxable basis is the car's low "book value" at that time; the tax is not calculated on the basis of the car's value when originally purchased. Vt. Stat. Ann. tit. 32 § 8907. Regardless of the person's state of origin, the tax rate is the same: four percent of the taxable cost or $600, whichever is smaller. Vt. Stat. Ann. tit. 32 § 8903(b).

The resident who purchases a car in Vermont is liable for the full sales tax (i.e., the lesser of four percent of the vehicle's taxable cost, or $600). Vt. Stat. Ann. tit. 32 § 8903(a). If the resident were to purchase a car in a state that does not afford reciprocity with Vermont, he or she would be liable, upon registering the vehicle in Vermont, for the full use tax. Vt. Stat. Ann. tit. 32, §§ 8903(b), 8911(9). If the resident were to purchase a car in a state that affords reciprocity, he or she would receive a credit toward the Vermont use tax of the sales tax paid the other state, but would also be liable for any difference between the two. Vt. Stat. Ann. tit. 32 § 8911(9).

When appellant purchased his car in Wisconsin he was a resident of that state and was obligated to pay its sales tax. As a resident of Wisconsin he had the right to use all its highway facilities. The sales tax bore a reasonable relationship to the services provided by Wisconsin and the revenue so raised accrued solely to its coffers. *J.C. Penny & Co., Inc. v. Hardesty*, 264 S.E. 2d 604 (W. Va. 1980). As a Wisconsin resident appellant was also obligated to permanently register the car in that state if he desired to use it there. Wis. Stat. Ann. § 341.40(2)

Appellant subsequently chose to move to Vermont, to become a resident, and to continue to drive his car on this state's highways. When he became a resident and obligated to register the car, Vt. Stat. Ann. tit. 32, § 8902(2), the use tax of $112 was imposed. By imposing the tax on the basis of its low book value as of the date of registration, appellant was treated by the state as though he had just purchased it in Vermont. If, at that time, a longstanding resident had purchased the identical car in Vermont a sales tax of $112 would likewise have been imposed. Vt. Stat. Ann. tit. 32, § 8903(a). If, at that time, a longstanding resident had purchased the identical car in a reciprocal state the $112 would be divided between it and Vermont; the reciprocal state would keep a portion (its sales tax, if any), but the resident would be liable to Vermont for the difference between it and the use tax, Vt. Stat. Ann. tit. 32, § 8911(9), if he or she desired to drive it in Vermont. Vt. Stat. Ann. tit. 32, §§ 8902(2), 8903(b). Appellant ignores the fact that if the Vermonter had permanently registered the car in the state where it was purchased,

he or she would not receive credit toward the use tax if registration were subsequently sought in Vermont: a resident must register the car and pay the sales or use tax in Vermont in order to drive it on public highways. Vt. Stat. Ann. tit. 23, § 301. If it were permanently registered elsewhere, the owner would not be considered a Vermont resident for the purpose of the § 8911(9) credit. Vt. Stat. Ann. tit. 32, § 8911(9).

Accordingly, appellant's premise is incorrect: had appellant been a resident of Vermont at the time he purchased his car, he would not have received credit for the sales tax paid Wisconsin. Because the car had been permanently registered in Wisconsin both appellant and the longtime resident would be liable for the same amount of use tax. As the Vermont Supreme Court stated, "Under the present statutory scheme, plaintiff pays the same tax and is treated in exactly the same manner as all non-exempt persons, including the resident who purchases his vehicle in a nonreciprocal state." *Leverson v. Conway*, __Vt.__ (Filed, June 15, 1984), Jurisdictional Statement at 22a.

B. The Vermont Supreme Court Was Clearly Correct In Its Decision That The Motor Vehicle Purchase And Use Tax Does Not Violate The Commerce Clause, And Thus A Substantial Federal Question Is Not Presented.

Sales and use taxes are different in concept and are assessed upon different transactions. *McLeod v. Dilworth*, 322 U.S. 327, 330-31 (1944). Vermont imposed a use tax only after the appellant became a resident, and it was based upon the value of the car at that time; it was not based upon the sales price paid by appellant when he purchased the car in Wisconsin as a resident of that state. The new resident who brings along a car which had been previously registered in a different state is liable for the same amount of tax as the lifelong resident who, at the same time, purchases the identical car in Vermont (or elsewhere) and who wishes to use it on Vermont highways. See *Section A, supra; Leverson v. Conway*, __Vt.__ (Filed, June 15, 1984), Jurisdictional Statement at 22a.

Any "disparity" in the total tax paid results from the fact that appellant was a legal resident of several states and that "a state, for many purposes, is to be reckoned as a self-contained unit, which may frame its own system of burdens and exemptions without heeding systems elsewhere." *Henneford v. Silas Mason Co.*, 300 U.S. 577, 587 (1937). Anent the tax treatment by Vermont, however, "when the account is made up the stranger from afar is subject to no greater burdens as a consequence of ownership than the dweller within the gates. The one pays upon one activity, and the other upon another, but the sum is the same when the reckoning is closed...." *Henneford v. Silas Mason Co.*, 300 U.S. 577, 584 (1937). The challenge under the Commerce Clause is nothing more than an attempt by a new resident to avoid his responsibility to this state and to obtain preferential treatment.

Appellant has revealed that there have been only two state court decisions addressing the Commerce Clause issue, one of which was rendered by an intermediate appellate tribunal. See *Montgomery Ward & Co. v. State Board of Equalization*, 272 Cal. App. 2d 728, 78 Cal. Rptr. 373 (1969) cert. denied, 396 U.S. 1040 (1970). Nor do the commentators apparently believe that this issue is currently pressing, for the most recent law review article identified by appellant is nearly twenty years old. Clearly, a substantial federal question is not presented.

C. The Case Is Not Within The Appellate Jurisdiction Of The Court.

Appellant contends that the Court has jurisdiction under 28 U.S.C. § 1257(2). In the proceedings below, however, plaintiff did not explicitly challenge the constitutional propriety of any Vermont statutes. Rather, the action was commenced because plaintiff was aggrieved that the General Assembly had repealed, several years before he became a resident, Vt. Stat. Ann. tit. 32, § 8911(6) which had exempted new residents from liability for the motor vehicle use tax if the vehicle had been purchased, registered and used in another state for at least thirty days. Plaintiff posited that Vermont's failure to include him within one of the statutorily exempted classes, Vt. Stat. Ann. tit. 32, § 8911, impaired his constitutional right to travel. As the Court stated in *Charleston Federal Savings & Loan Association v. Alderson*, 324 U.S. 182, 185 (1945),

> "It is essential to our jurisdiction on appeal under § 237(a) that there be an explicit and timely insistence in the state courts that a state statute, as applied, is repugnant to the Federal Constitution, treaties or laws. [Citations omitted]. And it has long been settled that an attack upon a tax assessment or levy ... on the ground that it infringes a taxpayer's federal rights, privileges, or immunities will not sustain an appeal under § 237(a). [Citations omitted]."

See also *Jett Bros. Co. v. City of Carrollton*, 252 U.S. 1 (1919).

Accordingly, the Court lacks appellate jurisdiction. For the reasons set forth in sections III A and B, the Court should also deny certiorari.

IV CONCLUSION

For the aforegoing reasons, it is respectfully submitted that this appeal should be dismissed or the decision of the Vermont Supreme Court affirmed.

Respectfully submitted,

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APPENDIX

STATUTORY PROVISIONS INVOLVED

Vt. Stat. Ann. tit. 32, § 8902(2):

(2) "Resident"-resident shall include all legal residents of this state and in addition thereto any person who accepts employment or engages in a trade, profession or occupation in this state for a period of at least six months. Also in addition thereto any foreign partnership, firm, association or corporation doing business in this state shall be deemed to be a resident as to all vehicles owned or leased and ordinarily used by it in connection with its place of business in this state. Resident shall not include any person, firm or corporation not required to register motor vehicles by reason of any reciprocity provision with any other state.

Vt. Stat. Ann. tit. 32, § 8903(a):

(a) There is hereby imposed upon the purchase in Vermont of a motor vehicle by a resident a tax at the time of such purchase, payable as hereinafter provided. The amount of the tax shall be four percent of the taxable cost of the motor vehicle or $600.00 for each motor vehicle, whichever is smaller.

Vt. Stat. Ann. tit. 32, § 8903(b):

(b) There is hereby imposed upon the use within this state a tax of four percent of the taxable cost of a motor vehicle, or $600.00 for each motor vehicle, whichever is smaller, by a person at the time of first registering or transferring a registration to such motor vehicle payable as hereinafter provided, except no use tax shall be payable hereunder if the tax imposed by subsection (a) above has been paid.

Vt. Stat. Ann. tit. 32, § 8907:

The commissioner may investigate the taxable cost of any motor vehicle transferred subject to the provisions of this chapter. If the motor vehicle is not acquired by purchase in Vermont or is received for an amount which does not represent actual value, or if no tax form is filed or it appears to the commissioner that a tax form contains fraudulent or incorrect information,

he may in his discretion, fix the value of said motor vehicle at the average book value of the same make, type, model and year of manufacture as designated by the manufacturer as shown in the Official Used Car Guide, National Automobile Dealers Association (New England edition) or any comparable publication, compute and assess the tax due thereon, and notify the purchaser thereof forthwith by certified mail, and said purchaser shall remit the same within fifteen days thereafter.

Vt. Stat. Ann. tit. 32, § 8911:

The tax imposed by this chapter shall not apply to:

(1) motor vehicles owned or registered by any state or province or any political subdivision thereof;

(2) motor vehicles owned and operated by the United States of America;

(3) motor vehicles owned and registered by religious or charitable institutions or volunteer fire companies;

(4) motor vehicles owned and operated by a dealer and registered and operated under the provisions of sections 451-468 inclusive of Title 23;

(5) nonregistered motor vehicles other than tow or repairman vehicles;

(6) [Repealed.]

(7) motor vehicles, title to which on the effective date of this chapter is in the owner seeking registration thereof;

(8) motor vehicles transferred to the spouse, mother, father or child of the donor, or to a trust established for the benefit of any such persons or for the benefit of the donor, or subsequently transferred among such persons provided such motor vehicle has been registered in this state in the name of the original donor;

(9) pleasure cars acquired outside the state by a resident of Vermont on which a state sales or use tax has been paid by the person applying for a registration in Vermont, providing that the state or province collecting such tax would grant the same pro-rata credit for Vermont tax paid under similar circumstances. If the tax paid in another state is less than the Vermont tax the tax due shall be the difference;

(10) motor vehicles registered in Vermont by the transferor and transferred between that individual or partnership and a business entity controlled by the transferor, if the transfer is exempt under section 351 of the United States Internal Revenue Code in effect July1, 1966;

(11) motor vehicles owned or purchased in another state by a member of the armed forces of full time active duty or his spouse upon which a purchase, use or sales tax has been paid in another state, except that, if that tax is less than the tax payable in this state but for this subdivision, the tax applies in the amount of the difference;

(12) motor vehicles owned and operated by physically handicapped persons for whom the vehicle's controls have been altered to enable such persons to drive. This exception shall apply only when such handicapped person has been certified exempt from the tax by the commissioner of motor vehicles under the provisions of section 8901 of this title;

(13) motor vehicles obtained from the government as excess government property, or vehicles purchased with 100 percent federal funds and used for federally suported (sic) local programs.

Vt. Stat. Ann. tit. 32, § 8911(6) (repealed, 1979 No. 202 (Adj. Sess.), § 3 Pt. VI, eff. September 1, 1980):

The tax imposed by this chapter shall not apply to:

Pleasure cars, the owners of which were not residents of this state at the time of purchase and had registered and used the vehicle for at least thirty days in a state or province other than Vermont.

Vt. Stat. Ann. tit. 23, § 301:

Residents as defined in section 4 of this title, except as provided in section 301a of this title, shall annually register motor vehicles owned or leased for a period of more than thirty days and operated by them, unless currently registered in Vermont. A person shall not operate a motor vehicle nor draw a trailer or semi-trailer on any highway unless such vehicle is registered as provided in this chapter.

Wis. Stat. Ann. § 341.40(2):

If the owner of [a vehicle which is registered in another jurisdiction moves to Wisconsin] or if the vehicle is purchased by a Wisconsin resident, the vehicle immediately becomes subject to the laws of this state providing for the registration of vehicles.

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ARGUMENT

THIS COURT HAS JURISDICTION UNDER 28 U.S.C. § 1257(2).

Appellee incorrectly states that "plaintiff did not expressly challenge

the constitutional propriety of any Vermont statutes." Motion to Dismiss or Affirm, at 5. The opinions and questions presented below (e.g., "Does Vermont's motor vehicle purchase and use tax, 32 V.S.A. §§ 8903, 8911, impermissibly favor in-state purchases of cars over out-of-state purchases of cars, in violation of the Commerce Clause?") belie this assertion. Jurisdictional Statement, 69a. Lest there be any doubt, appellant has asked for certification of the record. Appellant invites this Court's attention to pp. 3, 8-9, 18, and 43 of his Vermont Supreme Court brief.

"Where it appears from the opinion of the state court of last resort that a state statute was drawn in question, as repugnant to the Constitution, and

that the decision of the court was in favor of its validity, [this Court] ha[s] jurisdiction on appeal." Charleston Federal Savings & Loan Association v. Alderson, 324 U.S. 182, 185 (145). Appellant challenged a Vermont tax statute on federal grounds. The Vermont Supreme Court rejected his challenge. The claim that this Court lacks jurisdiction of this appeal is frivolous.

CONCLUSION

This Court should note probable jurisdiction of this appeal.

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